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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD SALAZAR,

Defendant and Appellant.

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H025084

(Santa Clara County Superior Court No. CC123779)

A jury found defendant Richard Salazar guilty of two counts of aggravated sexual assault on a child under 14 and more than 10 years younger than defendant (Pen. Code, § 269 [counts 1 & 2]) and two counts of forcible lewd and lascivious conduct on a child under 14 (Pen. Code, § 288, subd. (b)(1) [counts 3 & 4]). The jury found true allegations that defendant had committed the forcible lewd conduct on more than one victim in conjunction with counts 3 and 4 (Pen. Code, § 667.61, subds. (b) & (e)). Defendant was sentenced to state prison for a term of 60 years to life. On appeal defendant contends, with regard to the admission of evidence regarding his prior sexual offenses, that (1) Evidence Code section 1108 ("section 1108") violates due process and equal protection clauses of the Fourteenth Amendment (2) the trial court erred by admitting the documentary evidence of his prior juvenile adjudication since it constituted inadmissible hearsay (3) the trial court abused its discretion in admitting that same

documentary evidence under section 1108 because that section contemplates only live testimony (4) the trial court abused its discretion by denying defendant's request to present live testimony from one of the victims in the prior juvenile case (5) the prior juvenile petition and adjudication were inadmissible under section 1108 because the evidence was more prejudicial than probative under Evidence Code section 352 ("section 352"). Defendant also contends the erroneous admission of detailed testimony of his sexual assaults under the "fresh complaint" doctrine requires reversal and that the trial court abused its discretion by failing to grant his Penal Code section 1385 motion to dismiss counts 3 and 4. Assuming arguendo he waived any of the above contentions by failing to raise the contention below, defendant claims his trial counsel provided ineffective assistance by failing to make the proper objections to the trial court. Defendant also contends the cumulative impact of the errors in his case was prejudicial and requires reversal.

I. Facts

Defendant was in a relationship with A. for approximately two and a half years. The relationship began in January of 1999. A. has five children; defendant is the biological father of one of the five. A.'s oldest children, 7-year-old R. and six-year-old J., were born before A. met defendant. A. testified that R. and J. were severely disciplined by defendant, that he was "harder on them than he was on the other children." A. saw defendant spank J. and R., punch them, hit them with a belt, and place them in cold water. A. also saw defendant make R. and J. stand in a corner, sometimes for "hours." A. had "a problem" with how defendant treated R. and J. She tried to leave defendant once but he "wouldn't let [her];" at that time, he pushed her and made her fall "over onto some buckets," causing the children to cry.

At approximately 6:20 a.m. on July 8, 2001, San Jose Police Officer Daniel Haws went to the residence of defendant and A. in response to a caller requesting a "welfare check" of young children playing in the street without adult supervision.

Haws found three of A.'s children, including J. and R., running and playing in the street unsupervised. They were "[v]ery dirty and unkempt," and their feet, legs, and hair were "grimy" as if they had not been bathed "in some time." The children reported that they had crawled out through a bathroom window. In response to the officer's pounding, A. and defendant opened the door to their studio apartment, which was messy and filthy, with spilled food on the ground. In response to learning the children had gone outside while he was asleep, defendant was "[a]pathetic." He appeared more concerned about his own two children than he was about R. and J.[1] J. and R. were taken to a children's shelter.

Registered nurse Robin Brown examined J. and R. when they arrived at the shelter. Brown testified that both were very frightened and very dirty when they arrived. At first J. was very quiet and "in herself" but then she "just started telling [Brown] things during the exam" that "were very disturbing." J. was "quivering and scared" as she said that defendant had hit her, that he had put her in a cold bath for punishment, and that he "would hold her head in the water." J. also told Brown that defendant would make her and R. remove all of their clothes and then make her "lay *[sic]* on top of [R.]." After J. made this last disclosure, she hid under the examining table for at least ten minutes. R. told Brown that defendant often hit him with a belt and that defendant hit him "a lot and even if he wasn't bad." R. asked Brown if he and J. could "stay at the shelter as long as we want to." He also asked, "do you think if they make us go home, do you think if the policeman could come sometimes and look in the window and make sure we are okay."

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[1] Defendant was the biological father of one of A.'s five children. A. had been pregnant when defendant met her, and he considered that child "as mine" even though he was not her biological father.

Registered nurse Anabelle Ablan did separate physical skin assessments of R. and J. at the shelter. R. "spontaneously" told Ablan that defendant had been "mean" to him and J., that he made them stay in the corner overnight without food, and that he spanked R. and hit him with a belt "for no reasons." Ablan noticed bruises on R.'s arm and on the back of his legs; Ablan testified the leg injuries appeared to be belt marks. R. told Ablan defendant had made J. get on top of R. and that defendant pulled down J.'s pants and then had R. hold J.'s "butt cheeks." R. added that defendant made R. and J. "hold each other's butt." Ablan found bald spots on the back of J.'s head.

When R. later was examined at Valley Medical Center, no evidence of injury or sexually transmitted disease was found. J. did not wish to be examined.

When rehabilitation counselor Kristen Nigh spoke with J. at the shelter, J. was playing with toys when she said she needed to tell Nigh a "secret." J. then whispered that defendant "makes me lick his wee-wee and he puts his wee-wee in my butt and shakes me up and down." J. said these sex acts occurred "a lot." J. added that defendant had told her "not to tell anyone" or he would do these things again. J. said these threats had scared her.

R. testified at the July 2002 trial that he was seven years old. When R. had lived with defendant, defendant had hit R. for no reason, put him in the corner "a lot," and had placed R. in a cold bath and dunked his head on more than five occasions. He left R. in the bathtub all night; R. would get out after defendant fell asleep. In the bedroom, defendant once pulled down his own pants and underwear, "his private came out," he put both his hands on R.'s head, he pushed R.'s head down toward his "private," and he forced R. to put his "whole mouth [] on to his private." Defendant's "private" stayed "up" while defendant's hands pushed R.'s mouth up and down. This made R. feel badly. When R. tried to remove his mouth from defendant's private, defendant would make R. stay there longer, telling R. to "do it some more." R. said defendant went "to the bathroom a little bit" in R.'s mouth. R. said "something" came out of

defendant's private, it went into R.'s throat, and it tasted "bad." When R. told defendant he "peed in my mouth a little bit," defendant said "it was not pee." R. then swallowed it. Defendant also made R. and J. get on top of each other.

J. testified that she was six years old at the time of trial. J. testified that defendant repeatedly had dunked her head in cold water and that he had pulled down his underwear and forced J. to "suck his private part." Defendant had his hands on his "private part" when it was in J.'s mouth. When she tried to push him away, she could not do so. She also felt she could not say no to defendant "[c]ause he's a grown up." Defendant told J., "if you do it more, I'll give you some soda." J. did not like it when defendant placed his private part in her mouth. J. said she was forced to suck defendant's private part more than five times.

A.'s mother testified she had had custody of R. and J. in 1998 and 1999 because A. had no home. In 2001, the children were living with A. and defendant. On Easter Sunday 2001, A.'s mother visited and saw a bruise "in the form of a handprint" on J.'s face.

District Attorney's investigator Carl Lewis, an expert in Child Sexual Abuse Accommodation Syndrome, testified regarding the pattern of observed behaviors in victims of sexual abuse that include secrecy, helplessness, entrapment and accommodation, delayed or conflicted disclosure, and retraction.

J's foster parent testified that, on July 18, 2001, she was giving J. a bath when J. said defendant had touched her private parts. J. also said defendant had pulled her hair. The foster parent has seen a bald spot on the back of J.'s head.

When San Jose Police investigator Don Guess interviewed J. and R. on July 11, 2001, J. spontaneously told Guess that defendant put his "wee-wee" in her mouth. With diagrams Guess clarified that J. "termed the penis as the wee-wee." A videotape of R.'s interview was played to the jury. In it, R. stated that defendant forced J. to lie on top of R. with their stomachs touching. R. added that defendant had told R. to put his mouth

on defendant's "wee-wee" and that defendant peed in his mouth and he could feel warm liquid going down. Defendant had threatened that R. had "better" do this.

Guess contacted defendant for an interview. Defendant cancelled one appointment and then did not return telephone calls from Guess.

Over objection, the prosecution admitted certified copies of a juvenile petition and adjudication regarding two prior sexual assaults defendant committed as a juvenile.

Defendant testified that he did not molest either R. or J. Defendant, who was 21 years old at the time of trial, testified he had met J. and R. on January 1, 1999. He denied disciplining J. and R. by placing or dunking them in a cold bath, but he admitted having made them stand in the corner and that he had spanked each of them with a belt "about three times." He stopped using the belt on J. and R. after he had caused "a welt" to appear on R. Defendant said J. and R. thought that he was "mean." He had seen R. and J. "act out in . . . a sexual way" by trying to take each other's pants off and "getting on top of each other," alternating who would be on top. Defendant said he witnessed this behavior "many, three times" during 1999. Defendant testified that R. once came into the bedroom when Anita was performing "oral sex" on defendant. Defendant testified he believed J. and R. had truthfully testified that they had been molested and that "the jurors should believe the kids except for the part where they say [defendant] is the person that did it."

It was stipulated that J. had made a prior molestation accusation against someone else in 1999.

II. Discussion

A. Evidence Code Section 1108 Propensity Evidence

1. Constitutionality of Evidence Code Section 1108

Defendant contends section 1108 violates due process. That claim has been rejected by the California Supreme Court. (*People v. Falsetta* (1999) 21 Cal.4th 903, 907.) We are bound by the *Falsetta* ruling to reject defendant's due process

challenge. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Defendant concedes he has presented this argument to preserve the issue for further possible review by the California Supreme Court and by federal district courts.

Defendant also contends section 1108 runs afoul of the equal protection clauses of the United States and California Constitutions. Adopting the analysis in *People v. Fitch* (1997) 55 Cal.App.4th 172, 184-185, we reject defendant's equal protection challenge to section 1108. (See also, *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1309-1313 [rejecting equal protection claim as to Evidence Code section 1109].)

We conclude defendant has failed to establish a constitutional violation.

2. Admissibility of Prior Juvenile Adjudication to Prove Evidence Code Section 1108 Offenses

Defendant contends the trial court erred by admitting documentary evidence of his prior juvenile petition and adjudication to prove propensity under section 1108 since that evidence constituted inadmissible hearsay. Assuming arguendo trial counsel's objections to the introduction of this evidence were inadequate to preserve this hearsay issue on appeal, defendant claims his trial counsel provided ineffective assistance by failing to specifically object to the documentary evidence on hearsay grounds.

In her written in limine motions, the prosecutor sought to admit evidence of the two prior sexual assaults defendant committed as a juvenile. In that motion, the prosecutor noted that she had petitioned the juvenile court for release of the pertinent police report "so that appropriate discovery could be delivered to defense counsel in anticipation of the section 1108 witnesses testifying at [defendant's] jury trial." (Italics added.) The prosecutor then explained that the juvenile court had denied the People's request for release of the police report but had released information regarding the petition and adjudication of those prior sexual assaults. Relying upon Evidence Code

section 452.5, subdivision (b)[2], the prosecutor then moved "to admit proof of Defendant's prior sexual assaults via presentation of a certified copy of the petition and adjudication form." The prosecutor argued that the documentary evidence was admissible to prove propensity under section 1108.

In his written response to the prosecutor's motion to admit the above documentary evidence, defense counsel requested "exclusion of evidence sought to be introduced under Evidence Code § 1108 pursuant to Evidence Code § 352 and to secure [defendant's] constitutional right to a fair trial." (Capitalization and emphasis omitted.) Besides arguing that the prior assaults were remote and highly inflammatory, defense counsel contended the "records proposed to be admitted under the section 1108 theory do not describe the conduct in sufficient or intelligible detail to be meaningfully informative to a jury." In that regard, counsel argued that admission of such conclusory documentary evidence "will cause the jury to speculate wildly. Were the minors raped, abducted or worse? In fact the minors were not raped, abducted or penetrated with a foreign object but the documents do not particularize the specific conduct, and since such a variety of conduct is encompassed in the definition of the crimes confusion is inevitable." Defense counsel reiterated that "the 1995 Petition and Minute Order are legal confirmation of only the least adjudicated elements of Penal Code section 288(b)," that the conduct documented in the sealed documents "is not much more than" the least serious conduct covered by the statute, and that admission of the "records" would permit "wild speculation" regarding what conduct defendant committed.

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[2] Evidence Code section 452.5, subdivision (b), which is part of the "Criminal Records Act," (Stats. 1996, § 1, ch. 642 (A.B. 1387), provides that "[a]n official record of conviction certified in accordance with subdivision (a) of [Evidence Code] Section 1530 is admissible pursuant to [Evidence Code] Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record."

In her oral argument on the motion, the prosecutor argued "there is no case law that prevents the use of the juvenile adjudication as 1108 evidence in a criminal trial." She requested "in light of the . . . juvenile court decision . . . , that the Court allow the People to present certified copies of the petition that was filed in 1994 and the certified copy of the adjudication as a way of informing the jurors of the defendant's propensity evidence."

The trial court admitted the documentary evidence, finding that the prior offenses were not remote and that they were more probative than prejudicial.

At trial, after the documentary evidence regarding the prior sexual assaults was admitted into evidence, defendant testified that he did not molest either J. or R. On cross-examination, the prosecutor asked defendant, "In 1994, there was an adjudication against you for molesting [G.] Doe and [A.] Doe, correct?" Defendant answered, "Yes."

The hearsay issue raised here is not cognizable on appeal. Defendant did not object below to the admission of the evidence on hearsay grounds. Having failed to raise such an objection below, he has waived this issue on appeal. (Evid. Code, § 353; *People v. Waidla* (2000) 22 Cal.4th 690, 717.)

We therefore turn our attention to defendant's ineffective assistance of counsel claim.

"A defendant seeking relief on the basis of ineffective assistance of counsel must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings. [Citations.]" (*People v. Price* (1991) 1 Cal.4th 324, 440.) "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to

dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Strickland v. Washington* (1984) 466 U.S. 668, 697.)

Since the terms of Evidence Code section 452.5 only provide that records of *criminal convictions* fall within the definition of official records contained in the official records exception to the hearsay rule, we shall assume arguendo that the documentary evidence of the defendant's juvenile petition and adjudication regarding his two prior sexual assaults constituted inadmissible hearsay evidence under section 1108 and that the petition and adjudication should not have been admitted to prove propensity under section 1108.

However, we conclude defendant has failed to establish that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failure to raise the required hearsay objection.

The jury was instructed, pursuant to CALJIC NO. 2.50.01 (2001) Revision, that, "[i]f you find by a preponderance of the evidence that the defendant committed prior sexual offense[s], that is not sufficient by itself to prove beyond a reasonable doubt that [he] committed the charged crime[s]."

The admissible evidence presented during the prosecutor's case-in-chief provided overwhelming proof that defendant had committed the charged offenses.

During his trial testimony, R. testified defendant made R. touch defendant in a way that R. did not like. R. testified there were things he liked about living with defendant and there were times that he "had fun" with defendant. However, R. also testified that defendant often put R. in the corner for a "[l]ong time," would spank R. "for no reason," and would put R. in a cold bath and dunk his head when R. was bad. R. said defendant would leave him in the cold bath and R. would only get out when defendant went to sleep. When asked whether there was anything else that defendant "would do or have [him] do that [he] did not like," R. said he did not want to say it "because it's gross." When the prosecutor said they wanted to hear about it, R. shook his hand and

said "No." When the prosecutor said, "No one here thinks you're gross," R. responded, "No, [defendant's] the one who is the gross guy." Eventually, R. said the "gross stuff" would happen in the room where defendant and R.'s mother had a bed. R. said defendant's pants and underpants would go down at the same time and his "private came out." R. said he then had to "move his mouth." R. did not want to talk about what happened so the questioning switched to sports, candy, and chocolate until a morning recess was called. After the recess, R. testified that, when defendant's pants and underwear were down, defendant's hands would move from his sides to R.'s head and defendant would push R.'s head down to defendant's private and make R. "lick it." Defendant made R.'s "whole mouth go on to his private" and defendant's private would "[s]tay up" while defendant pushed R.'s mouth "up and down." R. testified that, whenever he would try to move his mouth away from defendant's private, defendant "would make [him] stay there longer," telling R. to "do it some more." R. testified that, when defendant had his private in R.'s mouth, he "accidentally went to the bathroom a little bit," adding that "something" came out of defendant's private and went into R.'s mouth and throat. R. said it tasted "[b]ad." When R. told defendant he had "peed" in his mouth, defendant told R. that it "was not pee." After defendant said it was not pee, R. swallowed it.

At the end of the prosecutor's direct examination of R., R. first said defendant did not have him and J. get on top of each other. He next said that when he told someone that that had happened, it was the truth. R. then said he was getting tired and that he wanted the prosecutor to stop asking him questions.

Registered nurse Brown testified J. was "really scared" when she reported that defendant made her take off her clothes and underwear and would tell her to lie on top of R. J. then quit talking and hid under the exam table in a fetal position. Registered nurse Alban testified that R. separately reported that defendant made J. take off her pants and underpants off and would have her lie on top of R. and then would have R. hold J.'s "butt

cheeks" or would have them hold "each other's butt." When rehabilitation counselor Nigh spoke with J. at the shelter, J. whispered that defendant "makes me lick his wee-wee and he puts his wee-wee in my butt."

At trial, J. testified defendant had pulled down his underwear and forced J. to "suck his private part" and that defendant had his hands on his "private part" when it was in J.'s mouth. When she tried to push him away, she could not do so. She also felt she could not say no to defendant "[c]ause he's a grown up." Defendant said, "if you do it more, I'll give you some soda." J. said she was forced to suck defendant's private part more than five times.

The admissible evidence reveals that R. and J. did not conspire to report defendant was molesting them so that defendant would be removed from their home since the children did not report the offenses until after they themselves were removed from the home based upon a report of neglect. They made their disclosure of sexual assaults when no family members were present and never indicated that they wanted defendant removed from the family apartment. R. and J. each testified at trial to the charged sexual acts and lewd conduct. They each described acts in which defendant forced them to perform oral copulation upon him. Their testimony regarding those acts was very detailed in terminology expected of children their age. J. also described how defendant had made her and R. undress and lie on top of each other, and R. testified that he had been truthful when he previously had disclosed that defendant had them undress and lie on top of each other and that defendant had made R. hold J.'s "butt cheeks." Each sibling's testimony corroborated the testimony of the other regarding the sexual offenses, and R. and J.'s mother confirmed the sibling's complaints that defendant severely punished them by keeping them in a corner for long periods of time, placing them in cold water, and beating R. with a belt. J. and the physical evidence of bruises and the testimony of their grandmother further corroborated R.'s testimony regarding the severe punishment defendant imposed. In addition, the admission of evidence of the

extrajudicial complaints made by R. and J. of a sexual offense showed that a prompt complaint was made, and that evidence substantiated the veracity of the trial testimony. (*People v. Brown* (1994) 8 Cal.4th 746, 755.)[3] Finally, J. and R. clearly identified defendant as their molester, and any suggestion that someone other than defendant molested them finds no support in the evidence.

In light of the above testimony, all of which was admissible, we are convinced it is not reasonably probable that a different result would have been obtained had the challenged section 1108 evidence been excluded. (*People v. Escobar* (1996) 48 Cal.App.4th 999, 1025, abrogated on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 919.) Accordingly, we conclude defendant's ineffective assistance claim is not well taken. (*People v. Price*, *supra*, 1 Cal.4th at p. 440.)

3. Need for Live Testimony to Establish Prior Act Evidence Under Section 1108

By separate argument, defendant contends the trial court abused its discretion in admitting documentary evidence of defendant's prior juvenile adjudication under section 1108 because that section contemplates only live testimony.

As discussed above, defendant did not challenge the means by which the prior adjudication was established in the trial court and his failure to do so precludes this challenge on appeal. (Evid. Code, § 353, subd. (a); *People v. Waidla*, *supra*, 22 Cal.4th at p. 717.) The issue is purely an evidentiary objection that does not present a question of compelling public policy or a constitutional violation. (Contrast, *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) We therefore consider this contention in the context of defendant's ineffective assistance of counsel claim.

Assuming arguendo that section 1108 evidence must be proved by live testimony, rather than by documentary evidence, we conclude the admissible evidence proved

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[3] We discuss defendant's contentions regarding the "fresh complaint doctrine" in the remaining portion of this opinion.

defendant's guilt so convincingly that defendant cannot establish that he was prejudiced by the inclusion of the improper section 1108 evidence at his trial. (*People v. Price*, *supra*, 1 Cal.4th at p. 440.)

4. Defendant's Request to Present Live Testimony from Victim of Prior Molest

Defendant contends the trial court erred by precluding him from presenting live testimony from one of the victims of the prior molestation.

At trial, defense counsel sought to present one of the victims of the prior sexual misconduct to testify that she did not recall the details of the offense. He claimed the proffered evidence would show that the incident was insignificant in the victim's life. The prosecutor objected that, since the juvenile court would not permit access to the police report detailing the prior incident, she could not adequately impeach or cross-examine the victim. Defense counsel acknowledged that neither party could use the police report or gain access to the sealed documents that outlined the circumstances of the prior adjudication. The prosecutor noted that the juvenile court limited the available options: "when the former victims were interviewed by a D.A. investigator, they said that they didn't remember and Judge Davilla was aware of that and was aware that the People wanted to use that police report at trial in order to either refresh their recollection or to impeach them and he prohibited use of that report in that manner."

The proffered witness could testify only to her lack of memory, not to defendant's innocence. Given our assumption that the section 1108 documentary evidence of defendant's prior juvenile petition and adjudication was improperly admitted at defendant's trial and our concomitant conclusion that the admission of that section 1108 evidence was harmless, it necessarily follows that any error in failing to admit evidence that would have minimally rebutted the section 1108 evidence was also harmless in this case.

5. Section 352

By separate argument, defendant contends the trial court abused it discretion under section 352 in admitting the prior act evidence.

For the reasons stated above, we conclude that, assuming arguendo the trial court erred by admitting the prior act evidence, the error was harmless since it is not reasonably probable that defendant would have received a better result if the evidence had not been admitted. (*People v. Malon*e (1988) 47 Cal.3d 1, 22 [*Watson* harmless error analysis applies to erroneous admission of character evidence]; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

B. Proof of Extrajudicial Complaint Made by Victims of Sexual Offense

Prior to trial, the trial court considered whether to admit the disclosures of the child victims to nurses Robin Brown and Anabelle Ablan under the "fresh complaint doctrine." It rejected the defense argument that the complaints were made too long after "the alleged misconduct" to be admissible under that doctrine. The court ruled that Brown and Alban were "fresh complaint witnesses" who could testify regarding the disclosures of sexual assault made to them by the two child victims. On appeal defendant contends the "fresh complaint" testimony of the staff from the children's shelter and of J.'s foster parent should have been limited to show only that complaints were made and thus it was not properly admitted "to the extent it revealed details about defendant's alleged acts." (Capitalization and emphasis omitted.) He also contends the trial court's instructions were insufficient to inform the jury that the testimony of J.'s foster parent, like the testimony of the staff from the children's shelter, was admitted only to show that disclosures of sexual assault were made by the child victims and not for the truth of the matter asserted. Defendant claims his trial counsel "made sufficient objection on hearsay grounds to preserve [these] issue[s], and if not, that it was ineffective assistance of counsel not to make the precise objection[s]."

Questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground urged on appeal. (Evid. Code, § 353, subd. (a); *People v. Saunders* (1993) 5 Cal.4th 580, 590.) By failing to challenge in the trial court the detailed nature of the testimony elicited

from prosecution witnesses regarding the victims' pre-trial disclosures of sexual assault and by failing to ask the trial court to include J.'s foster parent in the limiting instruction discussing testimony regarding such disclosures, defendant has waived those issues on appeal. Defendant's hearsay objection to some of the challenged testimony did not encompass his appellate complaints that the "fresh complaint" testimony either should have been excluded under section 352 or should have been limited to the facts of the reports and their circumstances. We note that defendant never objected to the testimony of J.'s foster parent regarding J.'s statements to her and that defendant cannot directly challenge that testimony for the first time on appeal.

We turn our attention to defendant's concomitant claim that his trial counsel provided ineffective assistance by failing to (1) object to the introduction of the "fresh complaint" testimony under section 352 (2) object to the introduction of the details of the disclosures by the child victims under the holding in reasoning in *People v. Brown* (1994) 8 Cal.4th 746, 763, and (3) request that the name of the foster parent be included in the limiting instruction discussing testimony regarding the disclosure of sexual assault by the alleged child victims.

"[P]roof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose -- namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others -- whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred. Under such generally applicable evidentiary rules, the timing of a complaint (e.g., whether it was made promptly after the incident or, rather, at a later date) and the circumstances under which it was made (e.g., whether it was volunteered spontaneously or, instead, was made only in response to the inquiry of another person) are not necessarily determinative of the admissibility of evidence of the complaint. Thus, the 'freshness' of a complaint, and the 'volunteered' nature of the

complaint, should not be viewed as essential prerequisites to the admissibility of such evidence." (*People v. Brown*, *supra*, 8 Cal.4th at pp. 749-750.) (Italics omitted.) Thus, "so long as the evidence in question is admitted for the *nonhearsay* purpose of establishing the circumstances under which the victim reported the offense to others, such evidence ordinarily would be relevant *under generally applicable rules of evidence,* and therefore admissible, so long as its probative value outweighs its prejudicial effect. (Evid. Code, § 352.)" (*Id*. at pp. 759-760) The evidence admitted should be "carefully limited to the fact that a complaint was made, and to the circumstances surrounding the making of the complaint, thereby eliminating or at least minimizing the risk that the jury will rely upon the evidence for an inadmissible hearsay purpose." (*Id*. at p. 762.)

We are convinced it is not reasonably probable that a different result would have been obtained had trial counsel challenged the extrajudicial complaints of J. and R. under section 352 and under *Brown* or had counsel asked that the foster parent's testimony be included in the limiting instruction given by the trial court.

Under *Brown*, the employees of the shelter would have been permitted to summarily testify that R. and J. had disclosed that defendant had forced them to remove their underpants and to lie on top of each other and that J. had disclosed that defendant forced her to orally copulate him. Further details of the offenses would have been excluded as inadmissible hearsay, but testimony would have been admitted regarding the circumstances of the reports, including the timing and length of the conversations, and the emotional states of J. and R. For example, evidence was admissible that J. and R. disclosed the sexual conduct spontaneously to the nurses and counselors at the shelter, that R. and J. showed signs of mental distress during their interviews, that J. was quivering and scared when she made some of her disclosures and that she hid under the table after making them, and that R. asked if the police could come by their home and look in the windows to make certain they were okay if J. and R. were returned to their home. We are

convinced that the trial court did not abuse its discretion in concluding that the admissible evidence regarding these extrajudicial complaints was more probative than prejudicial under a section 352 analysis.

Defendant had ample opportunity to examine the children who testified as witnesses. He was not denied any constitutional rights because J. and R. were present at trial and subject to cross-examination.

The trial court specifically instructed the jury regarding the limited effect of the testimony as follows: "The testimony of Robin Brown and Anabelle Ablan and Kristen Nigh regarding the disclosure of sexual assault by the alleged victims was admitted for the limited purpose of showing that the complaint was made. It was not admitted for the truth of the matter asserted. [¶] Certain evidence was admitted for a limited purpose. At the time this evidence was admitted, you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. Do not consider this evidence for any purpose except the limited purpose for which it was admitted." This explicit instruction limited the use of the challenged testimony, and we presume the jurors followed the instruction and that they were intelligent persons capable of correlating all jury admonition and instructions they received. (*People v. Mills* (1991) 1 Cal.App.4th 898, 918.) Given J.'s detailed testimony regarding the oral copulations and the lewd conduct, it is not reasonably probable the determination would have been different had the foster parent's testimony regarding J.'s disclosure that defendant had touched her private parts been included in the limiting instruction.

Defendant claims the "erroneous admission and reliance upon the improper and prejudicial evidence offered by the 'fresh report' witnesses is a federal due process violation." The denial of due process is established only where the trial "fail[s] to observe that fundamental fairness essential to the very concept of justice." (*Lisenba v. California* (1941) 314 U.S. 219, 236.) When reviewing the erroneous admission of testimony, we must "consider whether the admission of the evidence so fatally infected the

proceedings as to render them fundamentally unfair." (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919.) Here, we are convinced that the superfluous details admitted under the "fresh complaint" doctrine did not have a "substantial and injurious effect or influence in determining the [court's] verdict." (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 623.) Since defendant failed to sustain his burden necessary to demonstrate a due process violation, the *Watson* (*People v. Watson*, *supra*, 467 Cal.2d 818) standard of harmless error applies. (*People v. Fitch*, *supra*, 55 Cal.App.4th at p. 179.)

Accordingly, we conclude defendant's ineffective assistance claim is not well taken. (*People v. Price*, *supra*, 1 Cal.4th at p. 440.)

C. Denial of Defendant's Motion to Dismiss Counts 3 and 4

Defendant contends the trial court abused its discretion by denying his motion to dismiss counts 3 and 4 for lack of evidence to support the jury's verdicts.

The trial court understood its authority to dismiss a sexual abuse against a defendant under Penal Code section 1385 if no reasonable jury could have found the defendant guilty, but it refused to exercise that authority because it decided "there is sufficient evidence to support Count[s] 3 and 4."

In considering a motion to dismiss based upon insufficiency of the evidence to support the verdict, the trial court independently weighs the evidence. (*People v. Lagunas* (1994) 8 Cal.4th 1030, 1038, fn. 6.) If there is a conflict in the evidence and the evidence believed by the trier of fact was sufficient to support the verdict, the trial court's ruling will not be reversed unless the record demonstrates an abuse of discretion. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.)

In this case, the evidence supports the jury's verdicts as to the challenged counts. The jury was entitled to consider the testimony of both child victims as well as R's

videotaped statement to the police.[4] R. testified at trial that he truthfully told people that defendant had made J. and R. lie on top of each other. R. told Detective Guess that defendant made J. lay on top of R.. While defendant claims "there is absolutely no direct evidence of any sort in the record that [he] took any sexual gratification from these acts the children engaged in," the record established that defendant forced R. and J. to perform these acts in his presence. The nature of that particular conduct and its surrounding circumstances, as well as the other sexually motivated acts defendant engaged in with R. and J., establish the requisite intent.

We conclude the admissible evidence presented at trial contained substantial evidence to support the jury's verdicts as to counts 3 and 4 and that the trial court did not abuse its discretion in so finding.

D. Cumulative Error

In his final argument on appeal, defendant contends he is entitled to a reversal of the judgment based upon the cumulative effect of the multiple errors alleged on appeal. "A defendant is entitled to a fair trial, not a perfect one." (*People v. Mincey* (1992) 2 Cal.4th 408, 454.) When a defendant invokes the cumulative errors doctrine, "the litmus test is whether defendant received due process and a fair trial." (*People v. Kronmeyer* (1987) 189 Cal.App.3d 314, 349.) Accordingly, any claim based on cumulative error must be assessed "to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*Ibid*.)

Here, where the few errors in this case were harmless, defendant cannot establish that it is reasonably probable he would have a received a more favorable

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[4] R.'s videotaped interview with the police was admitted into evidence pursuant to the procedures set forth in Evidence Code section 1360. That evidence was presented to the jury in videotape form, thus allowing the court to independently evaluate R.'s demeanor and responses to questions. (See *Idaho v. Wright* (199) 497 U.S. 805, 818-819 [noting that videotaping may enhance reliability of out-of-court statements of children regarding sexual abuse].)

result in the absence of the errors. In other words, we are convinced that defendant "received due process and a fair trial." (*People v. Kronmeyer*, *supra*, 189 Cal.App.3d at p. 349.)

III. Disposition

The judgment is affirmed.

Mihara, J.

We concur:

Elia, Acting P.J.

Wunderlich, J.